No. 12,595

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT STROUD,

Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLANT.

ROBERT STROUD, No. 594,
Alcatraz, California,
In Propria Persona.

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JURISDICTION.

I.

This case involves a petition for an injunction filed by an inmate of Alcatraz against the warden of that institution in which the inmate attempts to restrain the warden from interfering with his property rights by unreasonable interference with his correspondence with his business agent, and seeks other redress (R. 2, 17).

II.

The petition filed in the United States Court for the Northern District of California, Southern Division,

hereinafter referred to as the District Court, alleges that appellant has been and is being deprived of his property rights by said warden acting under color of a statute of the United States (R. 2, 3, 16); that the actions complained of are the result of a conspiracy to deprive appellant of his property rights without due process of law (R. 3, 14); and that as a part of said conspiracy there there has been issued an unconstitutional order of an executive agency of the United States which has served as a pretext for the actions complained of (R. 4, 15).

Under these circumstances, the District Court had jurisdiction of the original proceeding pursuant to sections 43 and 47 of Title 8, U.S.C., and sections 1343, 1442, 2282 and 2284 of Title 28, U.S.C. (R. 4).

III.

Attached to the original petition filed in the District Court was a motion praying for the production of appellant in court for the purpose of presenting this action *in propria persona,* which the District Court had jurisdiction to grant pursuant to section 1651 of Title 28, U.S.C., and the Supreme Court's opinion in *Price v. Johnston,* 334 U.S. 226-291; 68 S.Ct. 1049 (R. 18).

IV.

Pursuant to section 1291 of Title 28, U.S.C., this court has jurisdiction to review all final orders of the District Court.

ACTION BELOW.

On March 20, 1950, appellant filed in the District Court a petition for an injunction (R. 2-48) restraining E. B. Swope, Warden of the United States Penitentiary of Alcatraz, California, from unlawful encroachments upon the property rights secured to the appellant by the Constitution and Laws of the United States, and asking for other redress (R. 2, 16-17).

On March 21, 1950, District Judge Louis E. Goodman denied the petition and dismissed the action (R. 48). And it is from that order that the petitioner, the appellant herein, brings this appeal.

LEGAL HISTORY.

I.

The present action is the third in which the appellant, who is untrained in law, has attempted, probably ineptly, to secure a judicial determination of property and other rights secured to him by the Constitution and Laws of the United States in actions based upon the operation of the aforesaid conspiracy, of which he has been the victim for nineteen years.

II.

In April, 1943, shortly after arriving at Alcatraz, he filed a petition for writ of habeas corpus in the District Court, *Stroud v. Johnston,* No. 23817 on the docket of the District Court.

The petition was denied and the action dismissed in a memorandum opinion filed by Judge Goodman on May 7, 1943. An appeal was allowed to this court and the action of Judge Goodman was affirmed in *Stroud v. Johnston,* No. 10527, in an opinion filed in this court on December 10, 1943.

Both the District Court and this Court held that the matter could not be tried on habeas corpus, and it was the opinion of practically all inmates of Alcatraz at that time that no other action could be employed by an inmate.

III.

On September 9, 1948, following the reading of Judge Denman's dissents in *Price v. Johnston,* 159 F. (2d) 234 and *Sanders v. Johnston,* 159 F. (2d) 74, in which the correct procedure in such cases is explained, appellant filed in the District Court a petition for an injunction alleging unlawful invasion of his property rights in violation of section 43 of Title 8, U.S.C. *(Stroud v. Swope,* No. 28295 on the docket of the District Court).

On September 15, 1948, there was a hearing before District Judge Dal M. Lemmon, sitting for Judge Harris, who was either indisposed or otherwise engaged, at which appellant was represented by two attorneys, Mr. William Fallon, 111 Sutter Street, San Francisco, appointed by Judge Harris to represent appellant, and Mr. Jacques Leslie, 275 Beverly Drive, Beverly Hills, California, employed by appellant's agent to represent him without consulting appellant.

At the hearing, Mr. Leslie made an oral argument which was wholly unresponsive to the issues before the court and which the appellant now knows was done deliberately, with the intention of causing the action to be dismissed, at the instigation of another client, Mr. Richard Palomar, who hoped to induce appellant's agent, L. G. Marcus, to sign a contract giving Mr. Palomar the moving picture and television rights to the story of the appellant's life under terms not favorable to the interests of appellant.

The petition in that case, although legally sufficient, had been drawn at a time when the appellant was under great physical and mental stress and was not nicely drawn.

Judge Lemmon felt that in view of the fact that appellant was represented by attorneys at the hearing, the pleadings should be properly drawn. In a memorandum opinion filed on December 7, 1948, he dismissed the action without prejudice and with leave to amend the pleadings, pointed out some of their shortcomings, and allowed ten days in which to file the new pleadings.

C. W. Calbreath, Clerk, failed to serve copies of Judge Lemmon's opinion and order upon appellant's attorneys within the time limit specified.

Upon learning of the opinion, William Fallon contacted Judge Harris and was assured by Judge Harris that he would make no issue of the time and that the

new pleadings could be filed at the convenience of attorneys (see R. 7, 8, paragraphs VII, VIII, and Exhibit A, R. 29-34).

Mr. Fallon informed appellant that he had no facility for preparing legal papers.

Mr. Leslie promised appellant that he would prepare the new papers at once, and continually and repeatedly renewed that promise over a period of one year, at the end of which time it became obvious to appellant that Mr. Leslie had never at any time had any intention of conforming to Judge Lemmon's ruling or of properly representing the appellant (R. 33-34).

IV.

Under these circumstances, appellant drew the new pleading himself, conforming to the best of his ability to the suggestion of Judge Lemmon and using more recent overt acts by the appellee as a basis for the action, and filed his petition as a completely new action, and that is the action which he now brings before this court on appeal.

STATEMENT OF CASE.

I.

This case involves a petition for an injunction and other relief brought by an inmate of Alcatraz against the warden of that institution in which the inmate seeks to restrain said warden from interfering with

his lawful and reasonable correspondence with his business agent, Mr. L. G. Marcus, other encroachments upon his property rights, and judgment for actual damages suffered by appellant as a result of encroachments upon his property rights by the appellee (R. 16-17, Prayer).

II.

The petition (R. 2-48) was filed in the District Court on March 20, 1950, was assigned to Judge Louis E. Goodman, and was arbitrarily dismissed by a one-sentence order filed on March 21, 1950 (R. 48) and it is that order that forms the basis of this appeal (R. 49).

III.

The appellant is serving a life sentence and, since 1916, has been continuously confined in solitary confinement, and for the last eight years he has been confined in solitary confinement in Alcatraz. For many years while confined at Leavenworth, he devoted himself to raising birds and carrying on research in the fields of Avian Pathology; Hematology; Bacteriology; and Therapeutics, with the result that he became widely and favorably known among scientists and bird fanciers throughout the world as the leading authority on the diseases of pet birds and as a writer.

This activity had been going on with the approval of various Attorneys General for many years prior to the establishment of the Federal Prison Bureau;

the appellant had made many important scientific discoveries, and had, by his efforts, established business interests beyond the prison walls.

In 1931, Sanford Bates created conditions making it impossible for the appellant to carry on by ordering Thomas B. White to stop the appellant from buying supplies for his birds.

The appellant, being unfamiliar with legal processes, but not unfamiliar with the arts of writing and salesmanship, had the temerity to challenge the authority of the Bureau before the court of public opinion.

When the appellant's publicity campaign broke on October 4, 1931, Sanford Bates excused his conduct by plucking out of thin air a rule not previously promulgated but prior-dated to July 1, 1931, so that it would not look as if it had been invented for the occasion, to the effect that prison inmates were not allowed to conduct business by correspondence (R. 3, 16). But he came up with the bright idea of having appellant's business socialized under the Prison Industries, Inc., and had contracts drawn to the effect.

Four hundred and thirty-one members of Congress made representation to Mr. Bates, and some of them told him bluntly that they had not voted him the power he possessed to have it used to destroy any man's property, the fruit of years of industry and good conduct. Others informed him that he had better pay more attention to the Constitution of the United States and less to the doctrines of Karl Marx.

Mr. Bates was forced to abrogate his rule so far as appellant was concerned, but thereupon, while publicly pretending to encourage the appellant, Sanford Bates, James V. Bennett, Austin H. McCormick, Fred G. Zerbst, and many other officials of the Federal Prison Bureau entered into a conspiracy to destroy appellant's property and make it impossible for appellant to ever obtain funds by any lawful means whatsoever that he might use to expose the machinations of the Federal Prison Bureau or create public pressure for his release. That conspiracy still exists and the appellee herein is a party thereto (R. 3, 5, 16).

IV.

Attached to the original petition filed in the District Court was a motion praying for an order for the personal appearance of the appellant for the purpose of prosecuting his action before the District Court *in propria persona* (R. 18).

V.

The petition alleges unlawful invasion of the property rights of the appellant (R. 3, 9, 12) by the appellee (R. 5, 9, 12, 16) by interference with the communications of appellant with his business agent and others (R. 9, 12), and attached thereto are two examples of the type of communication interfered with (Exhibit A, R. 29, and Exhibit B, R. 22).

VI.

The petition further alleged that all acts complained of are a result of the aforementioned con-

spiracy (R. 3, 5, 14); that the purpose of said conspiracy is to damage appellant in his property rights (R. 3-4, 6, 16); that appellant has suffered serious financial loss as a result of the actions of appellee (R. 12, 16); that said actions have been taken pursuant to an unconstitutional order of an executive agency of the United States (R. 4, 15); asked the court to restrain the appellee (R. 17) from enforcing said order and to declare said order null and void because of repugnance to the Constitution of the United States; and that the court render judgment for the appellant in the amount of his actual financial loss (R. 18).

QUESTIONS PRESENTED.

I.

Does a citizen of the United States, even though incarcerated in a penitentiary, retain property rights that his keepers are bound to respect?

II.

Are his rights to own property protected from official encroachment and conspiracy by sections 43 and 47 of Title 8?

III.

Are the facts alleged in the petition (R. 2-48) filed in the District Court, if true, sufficient to entitle appellant to the relief prayed for?

IV.

Does a single District Judge have authority to dismiss a petition for an injunction seeking to restrain an employee of the United States from enforcing an order of an executive agency of the United States on the grounds that said order is repugnant to the Constitution of the United States?

V.

Does appellant, an inmate of Alcatraz, in view of the facts set out in his motion (R. 18), have a right to prosecute this action in *propria persona?*

ARGUMENT.

ONE.

APPELLANT CONTENDS THAT AS A CITIZEN OF THE UNITED STATES HE RETAINS ALL THE PROPERTY RIGHTS OF OTHER CITIZENS OF THE UNITED STATES, AND THAT HIS KEEPERS ARE BOUND BY LAW TO RESPECT THOSE RIGHTS.

I.

In his *Summary of Allegations,* paragraphs I to V (R. 13-14) appellant has claimed certain property rights that under our Constitution and Laws are secured to all persons, and he contends that possession of property, as a matter of reason, presupposes the right to sell, bequeath, or transfer said property in any lawful manner whatsoever, since anything less is an encroachment upon ownership.

Appellant calls the court's attention to *Coffin v. Reichard,* 143 F. (2d) 443, wherein the court said:

> "A prisoner retains all the right of the ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law takes his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion."
>
> "When a man possesses a substantial right, the courts will be diligent in finding a way to protect it."

Under the Fifth Amendment to our Constitution the fundamental rights are *life, liberty,* and *property.* No further comment upon the implication of this opinion is necessary.

II.

In the case of *Stroud v. Swope,* No. 28295 on the docket of the District Court, an action in which appellant attempted to raise the same issues presented here, District Judge George B. Harris, at a hearing on October 11, 1948, commenting from the bench, said:

> "To deprive any man of the fruits of his mental industry is to destroy that man."

III.

On December 7, 1948, *Stroud v. Swope,* No. 28295, was dismissed without prejudice with leave to amend, as previously pointed out (*Legal History,* section III,

infra) by District Judge Dal M. Lemmon, who on page 3 of his memorandum opinion said:

> "That the petitioner has property rights in his book is unquestioned. Yet, if the interference with his correspondence is unreasonable and is unjustified as a prison regulation and injures his property rights such rights may be and should be protected by the equitable remedy of injunction . . ."

The law on this point is well settled so there is nothing to be gained by belaboring it further. It is true that appellant has been deprived of his liberty by due process of law, and those in authority over him have a duty to retain custody of his person and to maintain order in the institution to which he is committed, but at that point their duty and their authority ends. They have no jurisdiction over his property, whether that property is land or money given or bequeathed to him or, like his book, due to the creative activity of his mind, so long as he devotes his property to lawful purposes.

TWO.

THE APPELLANT CONTENDS THAT HIS RIGHT TO OWN PROPERTY MAY BE PROTECTED FROM OFFICAL ENCROACHMENT AND CONSPIRACY BY SECTIONS 43 AND 47 OF TITLE 8, U.S.C.

I.

Section 41 of Title 8 gives statutory force to the rights guaranteed by the 5th and 14th amendments, and clearly states that *all persons* shall have equal

rights under the law and security in their persons and property. It does not say *all persons except prison inmates,* and there is no case in the code annotated where it has been so construed. (Title 8 and 9 Annotated. West Publishing Company. See Pocket Part up to 1948.)

Section 43 provides for civil redress where the citizen is injured in his property rights by official encroachment.

Section 47 provides for civil redress where the encroachment and injury is the result of a conspiracy by any two persons.

Section 1343 gives the United States District Courts jurisdiction of civil rights cases. There is no case law holding that these sections do not apply to the Federal convict the same as to all other persons.

II.

Appellant calls the court's attention to Circuit Judge Denman's dissenting opinions in *Sanders v. Johnston,* 159 F. (2d) 74, and in *Price v. Johnston,* 159 F. (2d) 234.

The *Sanders* case was not appealed because the issue became moot.

The *Price* case was carried to the Supreme Court, which not only sustained Judge Denman's dissent, but actually enlarged and expanded it. (*Price v. Johnston,* 334 U. S. 266-291; 68 S.Ct. 1049).

No further argument is necessary.

THREE.

APPELLANT CONTENDS THAT THE FACTS ALLEGED IN HIS PETITION (R. 2-48), IF TRUE, ARE SUFFICIENT TO ENTITLE HIM TO THE REDRESS HE SEEKS (R. 16-17).

No argument on this point is necessary. A large amount of case law could be cited, but it would all be redundant. The petition itself alleges all the elements mentioned in the statutes, and nothing more is required. A careful reading of the annotation of civil rights cases up to and including 1948 (See Pocket Part, Title 8 and 9 Annotated) discloses no case to the contrary.

FOUR.

APPELLANT CONTENDS THAT THE SINGLE DISTRICT JUDGE HAS NO AUTHORITY TO DISMISS ANY ACTION IN WHICH THE PETITION SEEKS TO RESTRAIN A GOVERNMENT EMPLOYEE FROM ENFORCING AN ORDER OF AN AGENCY OF THE UNITED STATES ON THE GROUND THAT SAID ORDER IS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

I

In paragraph III of the *jurisdictional statement* (R. 4) the petition alleges that all acts complained of have been done under the legal pretext of complying with an unconstitutional order of the Prison Bureau.

(Note: Through some typographical error the word *Board* appears in the printed record where the word *Bureau* was intended. In the original text on file in the District Court the word *Bureau* was employed.)

II

In paragraph II of *Statement* (R. 5) appellant alleges that he was robbed of all proceeds from his book, *Diseases of Canaries,* as the result of a conspiracy within the Federal Bureau of Prison, while in paragraph VIII, *Summary of Allegations* (R. 15) the petition contains the allegation that the first act of said conspiracy was the issuance of an unconstitutional order by the Federal Prison Bureau. While in paragraph IX (R. 15) appellant alleges that said order was directed at him personally and is *wholly repugnant to the Constitution.*

III

In his prayer, (R. 16-17) appellant prays that the court issue a permanent injunction declaring said order repugnant to the Constitution and forever restraining the appellee from enforcing it.

IV

These allegations are sufficient to bring the case under sections 2282 and 2284 of Title 28. The latter section provides for the procedure to be followed in such cases and is clear and unambiguous in its terms.

Subsection (1) of Section 2284 provides that the District Judge to whom a petition is submitted shall file same and notify the Chief Judge of the Circuit Court. Subsection (5) provides that the action shall not be dismissed by a single judge.

Under these circumstances in the face of the clear provisions of the statute, Judge Goodman's action in

treating the petition as one for a writ of habeas corpus is so arbitrary and capricious as to amount to an abuse of power and a total failure to perform the judicial functions of his office.

FIVE.

APPELLANT CONTENDS THAT EVEN THOUGH HE IS AN INMATE OF ALCATRAZ, HE HAS A RIGHT TO PROSECUTE THIS ACTION HIMSELF BOTH HERE AND BEFORE THE DISTRICT COURT FOR THE FOLLOWING REASONS:

a. That as a result of the conspiracy previously mentioned (R. 3, 5, 15, 16) for eleven years at Leavenworth, 1931 to 1942, he was consistently refused permission to see or write to an attorney or to write to the United States attorney. That attorneys he got word to who came to the prison to see him were consistently turned away and refused permission to talk to him.

b. Letters of protest addressed to the United States Attorneys for Kansas and for the Western District of Missouri were returned to him by Fred G. Zerbst and by Isaac Sway who told him that they had orders from the Federal Bureau of Prison not to permit him to start any action which might cause unfavorable publicity for the Bureau.

c. For almost five years at Alcatraz appellant was refused permission to see an attorney. During this period, April, 1943, he asked

Judge Louis E. Goodman to appoint him an attorney. The request was denied.

d. In the Fall of 1946 appellant managed to talk to several attorneys. One of them, Frank Burns, 111 Sutter Street, San Francisco, frankly told appellant that he, Burns, deeply sympathized with him but could do nothing for him. That he had a wife and family and a living to make and that he could not afford to offend the Prison Bureau. Another, Ernest Spagnoli, agreed to visit petitioner and go into his case following the trial of Thompson executed for a part in the mutiny of 1946, but following that trial Mr. Spagnoli was refused permission to see the appellant, and appellant was told that he could write to any attorney in the Bay Area, excepting Mr. Spagnoli.

e. In case No. 28295, appellant's case was deliberately bungled and permitted to go by default by his attorney, Jacques Leslie.

f. Appellant has no attorney, has no funds to employ an attorney, and knows of only one attorney practicing in this district whom he would care to trust to handle his affairs, since he is not the only man in Alcatraz who has been told by San Francisco Attorneys that they could not afford to offend the Prison Bureau, or who has had good clear cases bungled by deliberate mismanagement. To ask that one attorney to handle his case with-

out pay and suffer further harassment at the hands of the F. B. I. would be unfair.

In *Price v. Johnston,* 334 U.S. 266 at page 12 of the printed opinion of the court (the writer does not have the reporter, but it would probably be at page 277 or 278), the court said:

> "In such situations where oral argument is slated to take place fairness . . . demands that both parties be accorded an equal opportunity to participate in the argument either through counsel or in person."

If this be true of an argument on appeal, it is a thousand times more true of a hearing in the District Court where the protection of a fundamental right may hang in the balance and where a complete grasp of the facts and circumstances surrounding the cause for complaint may be essential to the court in arriving at a fair and just judgment.

The court has laid down three conditions that must be met (pp. 16-17):

(1) "If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily of the confinement,

(2) "that he is capable of conducting an intelligent and responsible argument,

(3) "and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ."

(1)

The appellant is sixty-one years of age. He is suffering from arteriosclerosis which greatly interferes with the circulations in his hands and feet. To be taken anywhere in chains, even to wear them for only a few hours, is to invite the most excruciating torture from which it will take days to recover—an ordeal he would not contemplate undergoing if he did not think it essential to the ends of justice.

(2)

The appellant is a writer and scientist, with a well-trained analytical mind, and with an education that is rated the equivalent of a Ph.D. While he is unschooled in law and procedure, he is not totally unfamiliar with Legal History or legal reasoning. As a child he played in his Uncle's law office and was familiar with such names as Story, Church, Greenleaf, and Andrews before he had finished the third grade, and he had read everything they had written.

(3)

The writer has spent his entire adult life in prison, almost thirty-nine of those years in solitary confinement. He has preserved his sanity by devoting all of his spare time to study and creative mental activity. He is well convinced that he can put up an intelligent and well reasoned argument upon almost any subject under the sun, from the differentiation of *Salmonella Eartryke* to the classification of the *myxomyceteas* or

the structural relationships of the steroid hormones, vitamins, and carcanogenic substances. But he is totally unfamiliar with the mechanics of modern life. He knows exactly as much about driving a car or modern traffic regulations as a Berkenshire hog knows about the Quantum Theory or discontinuous differential equations. Left alone and unassisted on Market Street, he would probably starve to death before he could get to the other side. He wants to be free, but the only freedom he wants or would accept is that of carrying on his work under his own name and under more favorable conditions than prison can afford.

In one hundred years no case could be found fitting more perfectly into the Supreme Court's requirements.

CONCLUSION.

From the whole record and from the foregoing argument, it is obvious that Judge Goodman's action in this case is so arbitrary and capricious as to amount to a complete failure to perform the judicial duties of his high office, and his order should be reversed and the case remanded with directions defining the limits of the property rights claimed by the appellant, instructing the lower court on the procedure to be followed, and ordering the lower court to order the production in court of the appellant at all times when the Government is to be heard in this cause, since nothing less will meet the minimum requirements of

fairness the Supreme Court holds to be essential to due process of law. (*Price v. Johnston,* supra.)

Dated, Alcatraz, California,
October 16, 1950.

Respectfully submitted,
ROBERT STROUD, No. 594,
In Propria Persona.